

June 10, 2013

Clerk, U.S. Bankruptcy Court

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5 Below is an Opinion of the Court.
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RANDALL L. DUNN
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF OREGON

In Re:) Bankruptcy Case
LOVERIN RANCH,) No. 12-38626-rlld12
)
 Debtor.) MEMORANDUM OPINION
)

On May 13, 2013, I held an evidentiary hearing ("Hearing") on the Motion to Dismiss ("Motion") this chapter 12¹ case filed by Francis Carrington ("Carrington"). Following my review of the submissions filed by the debtor Loverin Ranch ("Loverin Ranch") and Carrington and the admitted exhibits, and hearing testimony and argument, I advised the parties that I intended to grant the Motion, but an order dismissing the case would be entered only after I prepared and entered a written opinion setting forth my findings of fact and conclusions of law.

¹ Unless otherwise indicated, all chapter and section references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and all "Rule" references are to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037. The Federal Rules of Civil Procedure are referred to as "Civil Rules." The Oregon Revised Statutes are referred to as "ORS."

This Memorandum Opinion sets forth the court's findings of fact and conclusions of law under Civil Rule 52(a), applicable with respect to this contested matter under Rules 7052 and 9014.

Factual Background

This case was initiated by the filing of a chapter 12 petition on November 19, 2012.² The petition was signed in behalf of Loverin Ranch by Eulaina Lynne Loverin ("Lynne") as a "partner." Loverin Ranch filed its chapter 12 plan for reorganization of its affairs (the "Plan") on February 19, 2013 (Docket No. 11). A confirmation hearing was scheduled for April 1, 2013, at 1:30 pm (Docket No. 16).

Carrington filed the Motion on March 22, 2013, supported by the Declaration of his counsel, Laura J. Walker. See Docket Nos. 23 and 24. In substance, the Motion argued that Loverin Ranch's chapter 12 case should be dismissed because it was not properly authorized, in that Loverin Ranch was an Oregon partnership, and unanimous consent of the partners was required to authorize a bankruptcy filing in behalf of the partnership. Carrington argued that not all Loverin Ranch partners consented to its chapter 12 filing. On March 25, 2013, Carrington filed an objection to confirmation of the Plan, coupled with a motion for continuance of the confirmation hearing to allow time for further investigation/discovery. See Docket No. 26. A preliminary hearing on the Motion was scheduled at the same time as the confirmation hearing. See Docket No. 29.

² I have taken judicial notice of the docket and documents filed in Loverin Ranch's chapter 12 case for purposes of confirming and ascertaining facts not reasonably in dispute. Federal Rule of Evidence 201; In re Butts, 350 B.R. 12, 14 n.1 (Bankr. E.D. Pa. 2006).

At the hearing on April 1, 2013, I determined that the Motion needed to be resolved prior to hearing issues with respect to confirmation of the Plan. Accordingly, I authorized the parties to engage in discovery; I set a deadline of May 6, 2013, for pre-Hearing submissions; I scheduled the Hearing for May 13, 2013; and I waived the forty-five day rule for chapter 12 confirmation hearings in this case for cause, as authorized by § 1224. See Docket No. 31.

In deciding the Motion, I have carefully considered the parties' submissions, all exhibits admitted at the Hearing, the testimony of Lynne and of Lee Loverin ("Lee"), and the arguments of counsel. At the conclusion of the Hearing, I closed the evidentiary record.

Discussion

Prior to 2002, Rule 1004(a) provided that a voluntary bankruptcy petition for a partnership could be filed only with the consent of all general partners. See Goldberg v. Rose (In re Cloverleaf Properties), 78 B.R. 242, 244 (9th Cir. BAP 1987). However, the Bankruptcy Rules Committee of the Judicial Conference of the United States, recognizing that no substantive provision of the Bankruptcy Code specified the manner in which a partnership could commence a voluntary bankruptcy case, amended Rule 1004 in 2002 to eliminate the unanimous general partner consent requirement for a voluntary partnership bankruptcy filing. See Advisory Committee Note to 2002 amendments to Rule 1004; In re Century/ML Cable Venture, 294 B.R. 9, 24 (Bankr. S.D.N.Y. 2003). Accordingly, whether a voluntary bankruptcy filing has been properly authorized is determined consistent with applicable nonbankruptcy, i.e., state law. See, e.g., Advisory Committee Note to

1 2002 amendments to Rule 1004; In re SWG Assocs., 199 B.R. 557, 559-60
2 (Bankr. W.D. Pa. 1996).

3 At the time that the Motion was filed, there was some question
4 as to what kind of partnership entity Loverin Ranch is, a general
5 partnership or a limited partnership. The Loverin Ranch partnership
6 agreement, as amended ("Partnership Agreement"), identifies certain
7 partners as "General Partners" and others as "Limited Partners." See
8 Exhibit 1, p.2. Paragraph 15 of the Partnership Agreement provides:

9 No limited partner shall be personally liable for any
10 of the debts of the partnership, or any of the losses
11 thereof beyond the amount originally contributed by
12 him, except for the debts existing or the debts
incurred in the initial formation of the partnership
structure with the P.C.A., F.H.A. or other lending
institutions or extensions thereof.

13 However, under Oregon law, in order to form a limited partnership, a
14 certificate of limited partnership including certain required information
15 "must be executed and submitted for filing to the Office of Secretary of
16 State." ORS § 70.075(1) (emphasis added). The limited partnership is
17 not actually formed until the Oregon Secretary of State files the limited
18 partnership certificate. ORS § 70.075(2). At the Hearing, the parties
19 conceded that no limited partnership certificate ever was prepared or
20 filed for Loverin Ranch. They agreed, as do I, that Loverin Ranch should
21 be treated as an Oregon general partnership in this case.

22 Filing a voluntary bankruptcy case is a paradigm action outside
23 the ordinary course of partnership business. See, e.g., In re Century/ML
24 Cable Venture, 294 B.R. at 27 and 28 n.27; In re SWG Assocs., 199 B.R. at
25 559:
26

1 The filing in this case of a Chapter 11 petition in
2 bankruptcy, which has as its purpose the
3 reorganization of the affairs of a debtor, cannot, in
4 good conscience, be viewed as an act whereby the 3
5 petitioning partners in this partnership debtor sought
6 to carry on its business in the usual way. Such a
7 conclusion is mandated by the relief sought by
8 petitioners in a Chapter 11 case, which is anything
9 but the normal process by which an entity conducts its
10 business.

11 In determining whether Loverin Ranch's chapter 12 filing was
12 properly authorized, two provisions of Oregon general partnership law,
13 ORS §§ 67.005-67.365, are particularly relevant. ORS § 67.140, entitled
14 "Partner's rights and duties," subparts 7 and 11 provide as follows:

15 (7) Each partner has equal rights in the management
16 and conduct of the partnership business.
17 . . .
18 (11) A difference arising as to a matter in the
19 ordinary course of business of a partnership may be
20 decided by a majority of the partners. An act outside
21 the ordinary course of business of a partnership and
22 an amendment to the partnership agreement may be
23 undertaken only with the consent of all the partners.
24 (Emphasis added.)

25 ORS § 67.140(11) states the general rule that actions outside the
26 ordinary course of partnership business can only be undertaken in behalf
27 of the partnership with the consent of all partners.

28 ORS § 67.015(1) provides a counterweight to the general rule,
29 stating, with exceptions not relevant in this case, "relations among the
30 partners and between the partners and the partnership are governed by the
31 partnership agreement." Neither the parties nor I have been able to find
32 any Oregon authorities interpreting the subject provisions of
33 ORS § 67.140(7) and (11) and 67.015(1) in this or a similar context.
34 However, there is nothing in the language of the Oregon general

1 partnership law that would preclude partners from providing in their
2 partnership agreement that decisions outside the ordinary course of
3 business could be made with less than unanimous consent of the partners.
4 In this case, the question is whether the Partnership Agreement in fact
5 provides for approval of a voluntary bankruptcy filing on less than
6 unanimous consent of the partners. I find that it does not for the
7 following reasons.

8 Exhibit 2 incorporates a series of resolutions ("Resolutions")
9 purporting to authorize and implement a chapter 12 filing in behalf of
10 Loverin Ranch. Its preamble states: "The undersigned partner on behalf
11 of [Loverin Ranch] . . . does hereby take the following action by consent
12 of the partnership." The Resolutions are signed by Lynne and dated
13 effective November 19, 2012, the date of Loverin Ranch's bankruptcy
14 filing. The Resolutions have all the earmarks of professional
15 preparation to document the decision of the Loverin Ranch partners to
16 authorize a chapter 12 filing in behalf of the partnership. I note that
17 no evidence was presented at the Hearing 1) that the Loverin Ranch
18 partners kept a "minute book" of partnership minutes or resolutions or 2)
19 that any minutes or written resolutions had been prepared previously by
20 the Loverin Ranch partners to document approved partnership actions.

21 In the Partnership Agreement, Lee is designated as both a
22 general and a limited partner of Loverin Ranch. See Exhibit 1, p.2. In
23 his Declaration filed in support of the Motion and in his testimony at
24 the Hearing, Lee testified that he did not consent to a voluntary chapter
25 12 bankruptcy filing in behalf of Loverin Ranch. See Docket No. 45, p.1.
26 Based on this evidence, I find that not all Loverin Ranch partners

1 consented to its chapter 12 filing.

2 Contrary to the argument of Loverin Ranch's counsel, the
3 Partnership Agreement does not generally provide "that a majority of the
4 votes will control the decisions of the partnership." Loverin Ranch
5 Memorandum in opposition to the Motion, Docket No. 40, p.4. However, the
6 Partnership Agreement contains several specific provisions that allow
7 decisions outside the ordinary course of the partnership's business to be
8 made by majority vote.

9 For example, Paragraph 8 of the Partnership Agreement provides
10 that, "The capital contributions of the limited partners shall be upon
11 the following terms: . . ." and subparagraph 8.2 thereafter provides:

12 The capital accounts of the limited partners shall be
13 expressed in terms of limited partnership shares which
14 shall consist of 683,000 shares of Class A limited
15 partnership shares and 57,000 shares of Class B
limited partnership shares. Each share shall have one
vote, with a majority vote controlling. (Emphasis
added.)

16 Embedded as it is in a Partnership Agreement paragraph expressly relating
17 to limited partner capital contributions and capital accounts,
18 subparagraph 8.2 is an unlikely vessel to provide that all partnership
19 decisions are to be made by majority vote of the partners. The subject
20 statement in context lends itself more to the interpretation that each
21 limited partner share will have one vote, and among the limited partners,
22 a majority vote will control in relation to partnership decisions on
23 capital contributions and capital accounts.

24 That interpretation is reinforced by the provisions of
25 Paragraphs 9 and 11 of the Partnership Agreement. Paragraph 9 provides
26 that, "The limited partners shall receive the distribution of the profits

1 and losses of the partnership as determined by a majority vote of the
2 general partners." Paragraph 11 provides that:

3 The general partner or partners shall have no interest
4 in the income or capital of this partnership except as
5 expressed below: The general partner or partners may
receive such reasonable salary as may be from time
[to] time agreed upon by a majority vote of the
respective shares of the general and limited partners.
6 The remaining income of the partnership shall be
7 divided among the limited partners as determined by a
8 majority vote of the general partners. (Emphasis
added.)

9 There are no other partner voting provisions in the Partnership
10 Agreement. There is no provision in the Partnership Agreement generally
11 authorizing the partners to make decisions outside the ordinary course of
12 partnership business by majority vote, and there is no specific provision
13 authorizing the partners to approve a voluntary bankruptcy filing by
14 majority vote of the partners.

15 Counsel for Loverin Ranch argued that even if the Partnership
16 Agreement itself did not clearly provide that partners could make
17 decisions outside the ordinary course of Loverin Ranch's business by
18 majority vote, the course of conduct of Loverin Ranch's business
19 historically must lead to the conclusion that the partners had agreed
20 that all business decisions for the partnership, whether in or outside
21 the ordinary course, would be made by majority partner votes.

22 Lynne testified, consistent with the Partnership Agreement,
23 that the partnership was formed in 1984. See Exhibit 1, p.8. Yet, the
24 only partnership decision outside the ordinary course of its business
25 that Lynne could identify specifically in her testimony that was made
26 without the consent of all partners was the 2003 decision to enter into

³ the \$250,000 loan transaction with Carrington. See Exhibit 5.

As a bottom line matter, the Partnership Agreement does not contain any provision authorizing the Loverin Ranch partners to make decisions, including the decision to file a voluntary chapter 12 bankruptcy in behalf of the Partnership, outside the ordinary course of partnership business by majority vote of the partners. Even if that lack could be supplemented by evidence as to a consistent historical pattern of outside the ordinary course decision making by a majority of the partners, one or possibly two outside the ordinary course decisions over the approximately thirty year life of the partnership do not establish a sufficient pattern to justify departing from the general statutory presumption set forth in ORS § 67.140(11) that acts outside of the ordinary course of the partnership's business "may be undertaken only with the consent of all of the partners."

Since Loverin Ranch's chapter 12 filing was not properly authorized with the consent of all of the partners, I conclude that I must grant the Motion.

Conclusion

Consistent with the foregoing discussion of relevant facts and the applicable law, I will grant the Motion. An order dismissing Loverin Ranch's chapter 12 case will be entered contemporaneously with this Memorandum Opinion.

³ Lynne also generally identified the 1992 loan transaction with the Farm Services Administration ("FSA") of the U.S. Department of Agriculture (see Exhibit 6). However, it was not clear from her testimony that the FSA financing transaction was entered into without the consent of all Loverin Ranch partners.

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3 cc: Virginia Andrews Burdette
4 Keith D. Karnes, Esq.
5 Holly R. McLean
6 Jonel K. Ricker
7 U.S. Trustee
8 Laura J. Walker, Esq.
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